No. 82-1249

IN THE

Supreme Court of the United States

October Term, 1982

JOSE OJEDA,

Petitioner,

v.

THE PEOPLE OF THE STATE OF NEW YORK,

Respondent.

On Petition for a Writ of Certiorari to the New York State Court of Appeals

RESPONDENT'S BRIEF IN OPPOSITION

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Preliminary Statement

On October 18, 1981, petitioner Jose Ojeda was convicted in the Supreme Court, New York County (McQuillan, J. at hearing; Hornblass, J. at trial), after a jury trial, of Criminal Possession of a Weapon in the Third Degree (New York Penal Law §265.02[4]). He was sentenced to five years probation, less forty-five days incarceration to be served on weekends. Execution of his sentence has been stayed pending the disposition of this petition.

By an order dated September 16, 1982, the Appellate Division, First Department, of the New York Supreme Court unanimously affirmed the judgment of conviction. *People* v. *Ojeda*, 89 A.D.2d 941 (1st Dep't 1982). Leave to appeal to the New York Court of Appeals was denied by a November 23, 1982, order of Judge Jacob Fuchsberg of that court. *People* v. *Ojeda*, 58 N.Y.2d 694 (1982). Petitioner now seeks a writ of certiorari in this case.

Statement of the Case

In the early morning hours of September 5, 1980, the car petitioner was driving was stopped by two New York City police officers, after petitioner had made an illegal left turn. A rental agreement revealed that petitioner was not an authorized driver of the vehicle. One of the officers saw petitioner lean forward in the car seat and drop his hands out of sight. Petitioner was ordered out of the car. A .357 Magnum pistol was recovered from under the seat, and petitioner was charged with its possession.

The Suppression Hearing

On April 13, 1981, a pre-trial hearing was held before New York Supreme Court Justice Peter McQuillan on petitioner's motion to suppress the gun recovered from the car. Officer James Dugan was the only witness at the hearing. He related the circumstances surrounding recovery of the gun.

While driving south on St. Nicholas Avenue in Manhattan during the early morning hours of September 5, 1980,

Police Officers Dugan and William Ohrnberger spotted a car with a Wisconsin license plate double parked in the northbound lane between 146th and 147th Streets. By the time the police made a U-turn, the Wisconsin car had begun to move toward 147th Street. At the corner, petitioner, the driver of the car, made a left turn without signalling and parked the car near a hydrant as the police pulled up behind him.

Officer Dugan approached petitioner, who had, unrequested, stepped out of his car. The officer asked him for his license and registration. Petitioner answered that he had neither. He said the car belonged to a friend, whom he named, and for whom he was parking it. After searching through some papers on the front seat, petitioner located a rental agreement in the glove compartment. Neither his name nor that of his friend was listed as an authorized driver. Although the Wisconsin car had not been listed as a stolen vehicle in the New York City stolen vehicle computer system, the officers decided to pursue their investigation of petitioner and the car at the stationhouse.

Officer Ohrnberger, who had possession of the car keys, got into the car, patted under the seat and recovered the gun. Back at the precinct, an inventory search of the car was conducted. Calls to the rental agency revealed that the car was missing from their lot.

In denying the defense motion, the court found that petitioner's failure to signal for his left turn was a proper predicate for the officers' request for petitioner's license and registration. When petitioner produced a rental agreement which named others as the authorized drivers, the

police had probable cause to believe the car was stolen and could then search the car for evidence of true ownership. The fortuitous seizure of the gun was proper.

In the alternative, the court found that the gun was admissible on a theory of inevitable discovery since an inventory search of the impounded vehicle would have revealed the gun's existence.

The Evidence at Trial

The People's evidence at trial consisted of the testimony of both Officers Dugan and Ohrnberger who related the facts of the case as they had been set forth at the hearing, with some additional details.

Officer Dugan added that, from prior experience with this national car rental agency, he knew that its rental agreements were printed by computer and were not handwritten as in this case. Officer Ohrnberger testified that when petitioner was looking for the car's registration, he was breathing heaviiy and his hands were shaking visibly. The officer also testified that as petitioner spoke to Officer Dugan from the car, Officer Ohrnberger saw petitioner lean forward and drop his hands out of sight between his legs. Drawing his gun, Officer Ohrnberger ordered petitioner out of the car. Some four or five inches under the front of the driver's seat, the officer retrieved a loaded .357 Magnum Ruger revolver.

Officer Dugan was also called by the defense, but his testimony paralleled his previous trial and hearing testimony. Petitioner then called two character witnesses in his behalf.

The State Appeal

Following his trial and conviction, petitioner appealed to the Appellate Division, First Department. He argued, *inter alia*, that the gun was illegally seized and that the jury was improperly charged on the presumption of knowing possession of a weapon in a vehicle. The court unanimously affirmed the judgment of conviction on September 16, 1982. Leave to appeal to the New York Court of Appeals was denied by Judge Fuchsberg on November 23, 1982.

The Instant Petition

On January 21, 1983, the instant petition was filed. Petitioner renews his claim that the presumption of knowing possession was unconstitutional as applied and that the gun was recovered following an unconstitutional search of the car.

Reasons for Denying the Writ

Generally, this Court will grant a petition for certiorari where novel issues of national import or constitutional dimension are raised, or where there exists a split among the federal appellate courts as to a particular issue. *See, e.g., Davis* v. *Alaska*, 415 U.S. 308, 315 (1974); *Katzinger* v. *Chicago Metallic Mfg. Co.*, 329 U.S. 394 (1947). *See generally* Stern & Gressman, *Supreme Court Practice*, Sec. 4.27, pp. 315-17 (5th ed. 1978).

As will be demonstrated, neither question petitioner raises justifies a grant of certiorari. At best, in his attack on the car search and the use of the presumption in this case, petitioner seeks correction of what he perceives to be

errors committed by the state courts in applying settled law to specific facts. However, this Court's discretionary power in granting certiorari is best served when exercised to review only those cases whose impact will extend beyond the particular facts and litigants. *See Magnum Co.* v. *Coty*, 262 U.S. 159, 163 (1923); *see also* Stern & Gressman, *Supreme Court Practice*, Sec. 4.2, pp. 257-59 (5th ed. 1978). This is not such a case.

1. Petitioner's first claim, that New York's presumption of gun possession in a car is invalid as applied to him, is no more than an expression of petitioner's disagreement with the state court's application of the facts of this case to settled law.

The constitutionality of New York's statutory presumption that occupants of a car knowingly possess the guns found inside (New York Penal Law §265.15[3]) has already been upheld by this Court and is not itself at issue. *Ulster County* v. *Allen*, 442 U.S. 140 (1979). There is no reason to grant certiorari to consider whether the presumption was valid under a particular set of facts. There is certainly no reason to do so here, because petitioner clearly came within the constitutionally permissible presumption.

So long as there exists a rational connection between the presence of the gun in the car and petitioner's knowing possession of it, the presumption is appropriate. *Id.* at 165. That rational connection was clearly supported even under the individual facts of this case. Immediately after the stop, petitioner, unrequested, got out of the car. When he returned to it to search for the car's registration, he was breathing heavily and his hands were shaking visibly. Most

significantly, while Officer Dugan was preoccupied in examining the suspicious rental agreement, Officer Ohrnberger saw petitioner lean forward in his seat and drop his hands out of sight between his legs. The .357 Magnum revolver was recovered from under the front seat. Petitioner's guilty knowledge of the gun's presence was thus amply demonstrated.

In a separate argument, petitioner asserts that the combined effect of the rules of standing and the presumption was to create an "unfair legal predicament" by depriving him of any chance to defend himself. *See* Petition p. 8. He argues that he could not contest the legality of the search for lack of standing, and that the application of the presumption then mandated his conviction. This argument, based on a false premise, must fail. Petitioner was not deprived of the opportunity to dispute his guilt.

First, the presumption in the New York law is not, as petitioner supposes, a mandatory one but is permissive, and could have been rebutted. Moreover, the statute itself contains certain exceptions which, if shown, would render the presumption inapplicable. New York Penal Law §265.15 (3). *See also Ulster County* v. *Allen, supra,* 442 U.S. at 162; *People* v. *Lemmons,* 40 N.Y.2d 505 (1976).

Second, a defendant's rights are not violated merely because the rules of standing leave him powerless to contest the introduction of evidence which will inevitably lead to his conviction. Even if this were the effect of these rules in a particular case, that result would create no issue justifying review by this Court. It is clear that the availability of a constitutionally valid presumption remains unaffected

by a case in which a defendant may lack standing to raise a suppression issue. There is, thus, no reason to resurrect the recently interred concept of automatic standing for these cases. *See, e.g., United States* v. *Salvucci*, 448 U.S. 83 (1980); *Rakas* v. *Illinois*, 439 U.S. 128 (1979).

Finally, in this particular case it is not altogether clear that petitioner was denied an opportunity to contest the seizure. The issue of standing was, as petitioner concedes, never addressed by the suppression court. Although it was raised before the Appellate Division, there is no reason to believe that that court did not simply affirm the hearing court's findings without reaching the issue of standing. New York Criminal Procedure Law §470.15. There is no reason to grant certiorari to consider an issue whose effect in this case is purely conjectural.

Thus, petitioner's first question presents no issue warranting the granting of the writ. The applicable law is settled, and, on the facts of this case, was correctly applied.

2. Petitioner's second ground for granting the writ, that the search of the car was unconstitutional, is similarly unavailing. In essence, his claim is that the police lacked probable cause to search the car and that the gun must therefore have been recovered pursuant to a "frisk" of the car, the propriety of which has not been approved by this Court and as to which there apparently exists a conflict within the circuits. Petition pp. 9-10.

Petitioner has again predicated his claim on the need to review an issue not presented in state court. The state court did not uphold the police seizure of the gun on a

theory of reasonable suspicion allowing a "frisk" of a car. Rather, the seizure was justified as pursuant to a lawful search based on probable cause. Consideration of petitioner's claim would require this Court to determine that, under the individual facts of this case, the state court erred in its determination of probable cause, and that had it not done so, it would have decided the case on the basis of the right to "frisk" a car.

There is obviously no basis for granting certiorari on an issue whose very presence in the case must be so tenuously inferred. Nor is there any reason to grant the writ to make the initial determination of whether the state court correctly applied established principles of probable cause in this case. That is particularly true here, where the finding of probable cause was amply supported by the record. Indeed, petitioner's inability reasonably to account for his presence in a car that neither he nor his "friend" were authorized to drive presented the police with a *prima facie* case of Unauthorized Use of a Vehicle, a Class A misdemeanor. New York Penal Law §165.05(1).

The seizure of the gun, then, occurred subsequent to the crystallization of the probable cause and was proper. *See United States* v. *Ross*, —— U.S. ——, 102 S. Ct. 2157 (1982); *New York* v. *Belton*, 453 U.S. 454 (1981). That it was only a stop for a "routine traffic infraction" which set this sequence of events in motion is irrelevant. Second, even if the facts justified only a stop and frisk, there is no disagreement within the circuits as to the propriety of a stop and frisk under these circumstances. Where the officer reasonably believes that there is a weapon present, he may look for it to insure his safety while he pursues his investi-

gation. *See, e.g., Adams* v. *Williams*, 407 U.S. 143 (1972). To the extent the federal appellate courts differ, it is on the propriety of general, unspecified searches of cars rather than on searches particularly directed at an area where the officers have reason to believe a weapon exists. The type of car "frisk" situation petitioner posits, then, is simply not present here. Coincidentally, however, that particlar issue is now before this Court. *See Michigan* v. *Long*, Dkt. No. 82-256.

Finally, even were petitioner correct in his legal arguments, the question is nevertheless inappropriate as a basis for a grant of a writ of certiorari. Petitioner has not only asserted as a basis for review an issue which was not crucial below, but has omitted an alternative ground for the decision which was present and on which the state court specifically relied. That ground for sustaining the seizure, a ground which petitioner does not even contest, is the principle of inevitable discovery. *See, e.g., United States* v. *Crews*, 445 U.S. 463, 470 (1980); *People* v. *Fitzpatrick*, 32 N.Y.2d 499, 506 (1973).

In light of the information contained in the rental agreement, the police had decided to bring the car and petitioner to the stationhouse to continue their investigation. They would certainly have been entitled to hold the car pending an investigation, regardless of whether they had arrested petitioner. At the precinct, the car would have been subjected to an inventory search and the gun recovered. *See, e.g., South Dakota* v. *Opperman*, 428 U.S. 364 (1976).

Since it is not disputed that there is a ground for the search which would be unaffected by petitioner's present claims, there is no reason to review those claims.

Again, only settled law is at issue, and that settled law was correctly applied by the state courts.

Conclusion

The petition for a writ of certiorari to the New York State Court of Appeals should be denied.

Respectfully submitted,

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